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6 **IN THE UNITED STATES DISTRICT COURT**
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8 **FOR THE DISTRICT OF ARIZONA**

9 L.M.W., individually, and as the biological
10 father and on behalf of L.W., a minor,

11 Plaintiff,

12 vs.

CV-22-0777-PHX-JAT

Order

13 The State Of Arizona; Jonas Perry and Jane
14 Doe Perry, Husband and Wife; Anita
15 McDonald and John Doe McDonald, Wife and
16 Husband; Anna Apolinar and John Doe
17 Apolinar, Wife and Husband; Christina Gary
18 and John Doe Gary, Wife and Husband;
19 Brittany Scott-Membrila and John Doe
Membrila, Wife and Husband; Sonya Tyus
And James Tyus, Wife and Husband; A New
Leaf, Inc., and Arizona nonprofit corporation,

20 Defendant.

21 Plaintiff has now made certain expert disclosures. With respect to one of Plaintiff's
22 expert disclosures, Defendants state that "Plaintiffs disclosed expert opinions from Dr.
23 Barzman regarding L.W.'s alleged emotional distress, and Dr. Barzman opines L.W. has
24 symptoms of post-traumatic stress disorder that will be ongoing throughout his life. Pls.'
25 Resp. at ex. A, Barzman_000006-7." (Doc. 90 at 2). As a result of this disclosure,
26 Defendants seek an independent medical examination ("IME") of L.W. pursuant to
27 Federal Rule of Civil Procedure 35. Plaintiff argues (among other things) that the
28 disclosure did not put L.W.'s emotional state "in controversy" enough to justify an IME.

1 More specifically, Plaintiff argues that “garden variety” emotional distress claims are
2 inadequate to show “good cause” for an IME under Rule 35. (Doc. 89 at 2). Defendants
3 counter that the following acts of Plaintiff are sufficient to put L.W.’s emotional state and
4 distress at issue: “a) claiming L.W. is suffering symptoms of post-traumatic stress disorder
5 as a result of the alleged abuse; b) claiming that L.W. requires therapy or counseling for
6 18 years amounting to future medical expenses of \$218,506.70, ...; and c) intending to
7 use Dr. Barzman as a testifying expert at trial....” (Doc. 90 at 2).

8 Plaintiff makes several arguments against an IME. First, Plaintiff argues that under
9 the “*Turner* factors”, which come from a district court opinion in California, Defendants
10 have failed to show good cause. Plaintiff quotes *Turner* as holding that a claim of
11 emotional distress will place a plaintiff’s mental state in controversy such that a Rule 35
12 examination can be ordered by the Court when the claim is accompanied by one or more
13 of the following:

14 (1) a cause of action for intentional or negligent infliction of emotional
15 distress; (2) an allegation of a specific mental or psychiatric injury or
16 disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s
offer of expert testimony to support a claim of emotional distress; or (5)
17 plaintiff’s concession that his or her mental condition is in controversy.
(Doc. 89 at 2) (quoting *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995)).
18 Plaintiff then ignores the fact that Plaintiff has disclosed an expert on this topic, with is
19 the fourth *Turner* factor. (Doc. 89 at 3). Thus, assuming the *Turner* factors are binding
20 on, or persuasive to, this Court, Defendants have shown good cause under *Turner*.

21 Next, Plaintiff argues that Defendants mischaracterize Dr. Barzman’s opinions. In
22 this regard, Plaintiff states that when Defendant’s argue Dr. Barzman concluded, “L.W.
23 has symptoms of posttraumatic stress disorder and will require future treatment for
24 emotional distress” Defendants misstate Dr. Barzman opinions. Instead Plaintiff claims
25 Dr. Barzman opined that L.W. had evidence of PTSD, but that he did not meet the DMS
26 5 criteria for PTSD, and Dr. Barzman said Plaintiff “may” benefit from treatment, not that
27 he “will” require treatment. Assuming Plaintiff has more correctly summarized Dr.
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1 Barzman's opinions, even under Plaintiff's summary, Defendants would be entitled to
2 conduct an IME under Rule 35.

3 Third, Plaintiff argues that a recorded interview of L.W. conducted at Childhelp in
4 April 2021 should suffice as Defendants' IME. (Doc. 89-2 at 3). Specifically, Plaintiff
5 states, "Defendants are able to present this recorded assessment of L.W. to their expert for
6 the report, the same report which was presented to Dr. Barzman." (Doc. 89 at 5).
7 Plaintiff's counsel neglects to mention, however, that Dr. Barzman also conducted his own
8 interview/examination of L.W. on June 13, 2023, for purposes of the preparation of his
9 report. (Doc. 89-1 at 3). Thus, Plaintiff's argument that the April 2021 interview is
10 sufficient to count as a Rule 35 IME is rejected.

11 Finally, Plaintiff argues that even if the Court finds good cause for an IME under
12 Rule 35, the Court still has discretion to deny the request. Here, Plaintiff argues the Court
13 should exercise its discretion to deny the request because, "As part of the healing process,
14 limiting the number of times that L.W. has to recount this abuse not only key, but is
15 necessary for his well-being." (Doc. 89 at 6). The Court finds this argument to be
16 unpersuasive because L.W. was able to submit to an interview with Dr. Barzman to aid
17 his claims in this case. Accordingly, assuming the Court has discretion to deny the IME
18 after good cause has been found, the Court will not exercise that discretion to deny the
19 IME in this case.

20 Thus, good cause having been shown by Defendants,

21 **IT IS ORDERED** that Defendants' Rule 35 Mental Examination (Doc. 87) is
22 granted as follows:

- 23 1. L.W. shall appear in person for an Independent Psychological Evaluation;
- 24 2. The examination shall be conducted by Dr. John Tsanadis;
- 25 3. The examination shall be held on September 27 at 9:00 am;¹

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27 ¹ On August 2, 2023, the Court extended Plaintiff's expert disclosure deadline to
28 accommodate Defendants' need for an extension of time to respond to Plaintiff's written
discovery. (Doc. 75). This extension extended Plaintiff's deadline from August 7, 2023,
to August 22, 2023. Plaintiff then, apparently, used this extension to delay disclosing all
experts, not just experts whose opinions were based on the written discovery Plaintiff


1 4. The examination shall be at the office of Dr. John Tsanadis;

2 5. The examination **shall** be recorded or videotaped (at Plaintiff's request); and

3 6. Plaintiff's father may be present for the examination but may not participate.

4 **IT IS FURTHER ORDERED** that Plaintiff shall file an unredacted copy of the
5 complaint within 14 days of the date of this Order.²

6 Dated this 21st day of September, 2023.

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James A. Teilborg
Senior United States District Judge

25 claimed to need from Defendants. (Doc. 89 at 5). While that delay was not technically a
26 violation of the Court's Order, it makes Plaintiff's claimed "need" for an extension—to
27 have time to receive Defendants' discovery—misleading. Accordingly, although
Defendants suggest they are agreeable to further extensions of these deadlines, the Court
will adhere to the current schedule.

28 ² During the Court's consideration of this Motion the Court attempted to read the
complaint, but it is so heavily redacted that significant portions cannot be understood.